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Choice of Law and Forum Clauses and the Recognition of Foreign Country Judgments Revisited Through the Lloyd's of London Cases

Courtland H. Peterson*

New interest in the recognition of foreign country judgments is now manifest, not only in attempts to deal with these matters by treaty, but also most recently in a new study of the subject undertaken by the American Law Institute. In earlier times I made some modest contributions to the investigation of this field, mainly characterized by the proposal that such recognition should be tested and governed by the principles of *res judicata*, rather than by the ill-defined doctrine of comity of nations.¹ In the interim I have welcomed the development of several uniform laws in this area, as well as the work done in the Second Restatement of Conflict of Laws, and the growth of a substantial body of literature on the subject of recognition.² In the case law, a substantial majority of courts in this country have now evidenced a willingness to recognize and enforce the judgments of foreign countries, primarily in terms of *res judicata* theory.³

The policies embodied in *res judicata*, ideally, represent a balance between judicial efficiency and fairness in the individual case. The core concept of due process of law is the proposition that everyone must have an opportunity for a full and fair hearing in a legal controversy. Its correlative is the proposition that relitigation of issues already fairly decided is not only wasteful of judicial resources, but also can be as unfair to the victor in the earlier proceeding as denial of a hearing would have been to the loser. In the domestic context, deciding whether a litigant has already had the opportunity for a full and fair hearing is a fairly straightforward matter. Even at the next level, decision as to whether a party should be precluded by prior litigation in another state of the United States is relatively easy. A common language and shared legal heritage help to assure that tests of fairness in the adequacy of a prior hearing will have a high degree of similarity if not identity. The Full Faith and Credit Clause of our Constitution operates as a unifying force, requiring states to give the same effect to judgments of sister states as those proceedings would have in the place of origin. Failure to do so invites reversal and

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1. Courtland H. Peterson, *Res Judicata and Foreign Country Judgments*, 24 Ohio State L. J. 291-321 (1963); *Die Anerkennung auslaendischer Urteile in den Vereinigten Staaten*, Metzner Verlag, Frankfurt/M. pp. 161 (1964) (Monograph No. 18 in der Reihe Arbeiten zur Rechtsvergleichung published by the German Society of Comparative Law); *Die Anerkennung und Vollstreckung auslaendischer Urteile in den Vereinigten Staaten von Amerika*, 33 *Rabels Z.* 543-63 (1969); *Foreign Country Judgments and the Second Restatement of Conflict of Laws*, 72 *Colum. L. Rev.* 220-66 (1972).

2. See Eugene F. Scoles & Peter Hay, *Conflict of Laws*, 956-62, 996-1024 (2d ed. 1992) (collecting much of the modern literature and case law).

3. *Id.* at 1003, concluding that the modern trend toward recognition includes collateral estoppel as well as the traditional forms of *res judicata*.

enforcement by the federal courts, as a clear expression of our concept of federalism.

International recognition of judgments is obviously much more problematic. The absence of any cognate for the Full Faith and Credit Clause, except as provided by treaty,⁴ means that each nation is free to recognize and enforce foreign judgments according to its own law, or to refuse such recognition altogether.⁵ In the United States, an additional element of diversity is added by the fact that conflict of laws is regarded as a matter of state law rather than federal, with the consequence that each state of the United States is free to make its own decision about recognition of foreign country judgments.⁶

Many countries have regulated recognition practice through either bilateral or multilateral treaties, and the United States has done so with respect to the recognition and enforcement of arbitral awards.⁷ With respect to the recognition of foreign country judgments, however, the United States has thus far not followed this route.⁸ A first attempt to establish a bilateral treaty occurred in 1977, when such a proposal governing recognition between the United States and the United Kingdom received preliminary approval.⁹ Despite numerous revisions and attempted compromises final adoption of this document has never occurred, probably because of British resistance to the implementation of American tort and anti-trust law.¹⁰

Many observers, myself included, had assumed that such a treaty with the U.K. was a feasible project. A common language, shared legal traditions, and similar views of the prickly question of personal jurisdiction over transients made agreement between these two countries most promising. There even seems to be a high degree of similarity between the English and American views of *res judicata*.

4. Recognition between member states of the European Communities has been regulated by the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters since 1975, a document sometimes described as the "Full Faith and Credit Clause of the European Union." See Bartlett, *Full Faith and Credit Comes to the Common Market*, 24 Int. & Comp. L. Q. 44 (1975). The effects of this convention were extended to the members of the European Free Trade Association by the Lugano Convention of 1988. Somewhat similar provisions have been adopted by the Organization of American States and are in force in at least eight Central and South American countries. See generally Scoles & Hay, *supra* note 2, at 1003-07.

5. Among western nations France was one of the last major holdouts refusing to recognize foreign judgments in the absence of a complete reexamination of the merits; but even this barrier finally fell. See Kurt H. Nadelmann, *French Courts Recognize Foreign Money Judgments: One Down and More to Go*, 13 Am J. Comp. L. 72 (1964).

6. *Banque Libanaise Pour Le Commerce v. Khreich*, 915 F.2d 1000 (5th Cir. 1990); *Nelson Bunker Hunt v. BP Exploration Co. (Libya) Ltd.*, 492 F. Supp. 885 (N.D. Tex. 1980); *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 318 F. Supp. 161 (E.D. Pa. 1970). Cf. *Taylor v. LSI Logic Corp.*, 715 A.2d 837 (Del. 1998).

7. The United States acceded to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards in 1970; T.I.A.S. No. 6997, and Congress implemented the Convention by passing a new chapter to the United States Arbitration Act. 9 U.S.C. § 201.

8. Such a treaty would, of course, pre-empt state law under the Supremacy Clause, U.S. Const. art. VI.

9. See Hay & Walker, *The Proposed Recognition-of-Judgments Convention Between the United States and the United Kingdom*, 11 Tex. Int'l L.J. 421 (1976).

10. See Scoles & Hay, *supra* note 2, at 1007.

Moreover, few of us would have supposed that American courts were likely to be confronted with English judgments whose recognition would be seriously opposed on the grounds of public policy or on the theory that American litigants had been denied due process by the English courts. Yet, that is precisely the situation that is now unfolding in a series of cases involving Lloyd's of London, arising out of events now developing into an insurance scandal of international proportions and impacting thousands of American investors.

The purpose of this essay is to describe the broad outlines of these events and to discuss their implications for the future of American recognition practice. I will discuss some of the devices which Lloyd's has used to evade or avoid the traditional defenses to recognition, including the use of choice-of-forum and choice-of-law clauses, arbitration clauses, and the appointment of agents empowered, in effect, to confess judgment on behalf of American investors. I am concerned that the lower federal courts in the Lloyd's cases have inappropriately extended the enforceability of such clauses, and also that they have given inadequate attention to the requirement that state law apply in diversity cases. In conclusion, I will suggest that future cases, as well as the scholarly attention now being directed at recognition in this area, should explore the development of techniques which American courts might use to protect our citizens without sacrificing the benefits of a civilized recognition practice.

I. THE FACTUAL BACKGROUND OF THE LLOYD'S CASES

The main outline of the facts in these controversies do not appear to be seriously disputed, although the intentions and culpability of many individual participants are in issue. The following description is drawn from judicial opinions in some of the cases involved, from pleadings, affidavits and briefs filed in such cases, from other law review articles, and from several investigative reports concerning these matters. In addition, I have read much of the information available in a web site established by the American investors, and interested persons may also wish to consult that source for more detail or further references.¹¹ At the outset, it should be made clear that Lloyd's is not an insurance company in the sense that we have such enterprises in our system. It is rather a "society" which was established about 300 years ago, incorporated in 1871, and has historically acted as an association of individual insurers. Its primary function has been to regulate the insurance market which takes place within the association. There is a governing body drawn from the membership, which not only establishes and enforces rules by which the members must conduct themselves, as well as rules of eligibility for and withdrawal from the association, but also raises capital. To invest in underwriting

11. See <www.truthaboutlloyds.com> (sponsored by the American Names Association). While this source is highly informative, it is, of course, provided from an advocate's point of view and should be treated accordingly. Also on the Internet is a Special Report by TIME EUROPE on the Decline and Fall of Lloyd's of London (See <www.pathfinder.com/time/europe/magazine/2000/lloyds.html>) Feb. 21, 2000, vol. 155, No. 7. An abbreviated version of this report appears in Time, Feb. 28, 2000, pp. 54-60.

activities in the Lloyd's market, an individual had to become a member, or a "Name," by entering into an Agency Agreement with a Member's Agent, who then invested on behalf of the Name in one or more syndicates. Each syndicate is managed by a Managing Agent and will typically specialize in a particular type of insurance. Syndicates are not themselves entities, but are merely associations of individual Names. In order to become a Name, an individual was required to prove his or her financial worth and to deposit a specified sum in the form of a letter of credit issued in favor of Lloyd's. Names are liable without limit for their shares in the syndicates in which they invest (perhaps more accurately, in the syndicates in which their Member's Agent has invested on their behalf).

Originally established to provide insurance in the maritime industry, the syndicates accepted applications for insurance risks for one year, then allowed two more years for claims to come in and be settled. Each syndicate closed its "year of account" and wound up its affairs after the end of the third year, at which time the Names received their share of the profits, or paid their share of the losses, and their liability ended. Until that closure each Name pledged his entire personal wealth to back up his share in the syndicate's policies. If all claims could not be settled by the end of the third year the syndicate had to remain "open" and the profits and losses could not be shared among the Names involved until all claims were finally settled.

This three-year cycle worked reasonably well when insurance risks were confined to the maritime business, since the outcome of any given voyage would almost certainly be known within a year and claims settled within three. As Lloyd's expanded into non-maritime insurance, however, outstanding claims meant that syndicates frequently could not close their affairs within three years. Staying open longer, however, delayed the distribution of profits, and these delays were a serious disincentive to investment. Lloyd's solution was to have each closing syndicate pass the entire portfolio of policies it had written ("book of business"), as well as reserves to cover future claims against these policies, forward to syndicates which were still active. Although not strictly speaking "reinsurance" as defined in standard insurance business practice, Lloyd's called this portfolio transfer "Reinsurance to Close" (RITC). The reserves passed on to the successor syndicate to cover claims not yet made or settled were designated as "premiums." Since the successor syndicate assumed all the liabilities of the predecessor, RITC transactions allowed the syndicates to continue the practice of closing and distributing profits after three years. The problem was, of course, that as this type of transfer was repeated annually over many years, the investors in the most recent syndicate became personally liable for all of the latent liabilities of its predecessor syndicates. Unless the reserves (premiums in the RITC) passed on to the successor were adequate to pay the potential future claims, the result of using this device was to build a "time bomb" of liability. The creation of such time bombs was encouraged by conflicts of interest, since the profits which could be taken out as a syndicate "closed" would be reduced by the amount of reserves passed on to the successor. The latent claims would ultimately have to be paid, often by investors having no relationship to the Names who took their profits out of the earlier syndicates. In one

example given by the investors, the Sturge agency's syndicate number 210 was first established in 1920. At the end of 1971, by "reinsuring to close" Sturge 210 of 1969, Sturge 210 of 1970 took on liability for potential claims against policies written ever since 1920, because each successive syndicate had "reinsured to close" its predecessor.

Many of the general liability policies written by Lloyd's underwriters in the United States prior to 1968 were issued in broad form, unlimited both as to aggregate claims and exposure, and insuring against asbestos, pollution, and health hazard claims. The billions of dollars of losses suffered by Lloyd's Names in the late 1980s and early 1990's were a direct result of this type of chain or "tail" of latent liabilities for claims from these kinds of losses.

The assertions of the American investors in Lloyd's, who have formed themselves into an American Names Association (ANA), are essentially as follows.

Until about 1970, only citizens of the UK could become Names, and membership consisted of about 6000 wealthy Britons. Many of these were persons with titles and many had close connections to high-level government offices. This group was composed of both active Names, who were active underwriters of policies, managers of syndicates, and member's agents, together with external Names, who were passive investors not permitted to play any active role. For purposes of clarity, the active underwriters, managers, and member's agents are usually referred to as "insiders," as opposed to the external Names, the passive investors who had no control over actual underwriting. Lloyd's ruling committee, which was comprised entirely of insiders, brokers, and senior executives running the syndicates, learned during the 1960s of the potential future liability posed by discoveries about the hazards of asbestos and other pollutants. An investigative report called the Cromer Commission Report was issued in 1969, recommending that new Names be actively recruited so that additional assets would be available to meet impending losses, and that recruitment be facilitated by reducing the assets which each Name had to prove in order to establish membership. In 1972 Lloyd's opened its membership to Americans, and thereafter also began recruitment of Names in other countries. Membership rose to over 10,000 in 1977, to over 23,000 in 1984, and peaked at 32,433 in 1988. In 1981, the governing committee formed an "Asbestos Working Party," which revealed to insiders the potential dimensions of the impending disaster. According to the ANA, both the Cromer Report and the information developed by the Working Party were suppressed and the new Names being recruited were not informed of the probable liability which their membership entailed.¹² Also according to the ANA, the purpose of this expansion was not only to provide more assets to absorb the impending losses, but also to allow insiders to

12. The new Names were certainly informed that their individual liability was several and unlimited. In order to become a Name, the new inductee was required to go to London and to participate in an elaborate ritual not unlike an initiation ceremony, in the course of which they were told, according to one American Name, that they were liable for debts of the syndicates "down to their last cuff-link." What the new Names were not told, of course, was that losses rather than profits were the highly probable prospect of their investment.

avoid future liability by leaving those syndicates which were at risk.¹³ If true, what was involved was a gigantic Ponzi scheme, virtually fraudulent by definition.

In addition to expanding capital by recruiting new (and unsuspecting) Names, Lloyd's took two other protective measures during the 1980's. First, it lobbied for and succeeded in obtaining a new 'private act' of the British Parliament, entitled the Lloyd's Act of 1982, which not only provided Lloyd's with a wide latitude of immunity from legal liability but also gave the governing Council of Lloyd's broad new powers of self-regulation.¹⁴ The latter permitted the Council unilaterally (perhaps even retroactively) to amend the Lloyd's By-Laws, which until then could only be amended by a majority vote of the Names at a General Meeting. The Council, of course, was and is composed of Lloyd's insiders. The Names who were passive, external investors, assert that they were not informed of the extent and implications of these changes until 1991, when the losses for the 1988 year of account became public knowledge.

Second, Lloyd's required all Names to sign a new General Undertaking, which included choice of forum and choice of law clauses under which they "agreed" that all legal disputes would be brought in English court and decided under English law.¹⁵ These provisions were explained to the Names as a "procedural technicality."

13. The ANA reports that Mr. Ralph Rokeby-Johnson, for example, a senior underwriter and later a member of the Asbestos Working Party, advised his close friends in 1973 that asbestosis claims would bankrupt Lloyd's, and in the following year reinsured all of his pre-1969 liabilities with two American companies. These reinsurers were later successful in rescinding their policies on the ground of nondisclosure of material facts, and the risks were then off-loaded to two other Lloyd's syndicates, Merritt and Outhwaite. They also tried to rescind but were unable to do so, and this coverage was instrumental in the ruin of both syndicates. Rokeby-Johnson has reportedly retired to California, where he now enjoys a very superior lifestyle. Support for the first part of this assertion is found in an affidavit submitted in a case filed in Utah state court by the Attorney General of that state against Lloyd's in 1996, by a senior underwriter named Roger Bradley, who had worked at Lloyd's from 1957 until 1986. *Utah v. Lloyd's of London*, Utah Third Judicial District, Case No. 960902920CV.

14. The ANA reports that about 50 insider Names were members of the British Parliament which passed this immunity statute, giving rise to serious questions of conflict of interest on their part.

15. The text of the clauses was, in pertinent part, as follows:

The rights and obligations of the parties arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and any other matter referred to in this Undertaking shall be governed by and construed in accordance with the laws of England.

Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at, Lloyd's and that accordingly any suit, action or . . . arising out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England. . . .

Riley v. Kingsley Underwriting Agencies Ltd., 969 F.2d 953, 955-56 (10th Cir. 1992). The General Undertaking between the Names and Member's Agents also included similar clauses referring to English law and courts, but in addition had a provision for mandatory arbitration in England.

They proved, however, to be critical in litigation in American courts in the 1990s, after the massive losses caused by reinsurance to close and retrocessional¹⁶ insurance were disclosed.

When the catastrophic losses produced by these long tails of liability began to emerge in the 1990s, Lloyd's first paid claims out of premium reserves and then began sending cash calls to Names on the syndicates involved, at first passing these off as losses attributable to extraordinary events such as hurricanes and oil spills or oil rig fires. In 1991, Lloyd's announced losses of 500 million pounds (about \$800 million), portraying them as "short tail" claims of this type, although they represented historical record losses at that point. In fact, however, these "Act of God" losses served only as a temporary smokescreen for the true nature of impending losses, primarily attributable to asbestosis and other health hazard claims, which by 1995 had grown to \$14 billion (by Lloyd's own, unaudited, accounting figures).

In the face of such losses, it became increasingly apparent that the customary RITC procedure could not continue to function, to allow active syndicates to close. Lloyd's response was to create a gigantic new reinsurance enterprise, called Equitas, into which almost all of the pre-1992 liabilities of all of the then-active syndicates would be moved. This allowed new syndicates to be formed without the "tail" of past claims so that the Lloyd's market could continue to sell insurance. This program was called "Reconstruction and Renewal" (R&R). The reserves of Equitas were funded from a variety of sources, most importantly by the participation of all of the Names in prior syndicates which had been unable to close.¹⁷ This was accomplished in two ways.

First, the Names were made an "Offer of Settlement"¹⁸ conditioned upon their payment of an additional 1.4 billion pounds. Although not ending Names' future liability if Equitas was unable to pay all claims, this offer did give them some respite from enforcement. As further inducement, Names accepting the offer were to be awarded "credits" against the amount required to be paid in, to be derived from impounded litigation recoveries and the strength of the claims of each individual Name, as judged by Lloyd's. To obtain these credits, however, Names accepting the offer were required to give complete releases to Lloyd's, the brokers, underwriting agents, auditors (and others), waiving all claims for damage or rescission—including even claims arising out of misrepresentations in the offer of

Id. at 955.

16. The ANA alleges that the massive recruitment of new Names produced an excess of new capital, and that, in order to keep this "excess capital" in the market "in play," syndicate managers unnecessarily insured other syndicates against excessive loss during their years of account and in effect obtained reinsurance on reinsurance (which is called retrocessional insurance). The ultimate effect was to magnify the losses in the syndicates in which such reinsurance was placed.

17. Lloyd's calculated the premium required for such reinsurance at 14.7 billion pounds, as against 9.9 billion pounds of syndicate assets then on hand. For the other sources relied upon *see* Defendants' Memorandum of Law at 23, in *Society of Lloyd's v. Ashenden*, No. 98-C-5335, 1999 WL 284775 (N.D. Ill. Apr. 23, 1999).

18. Actually Lloyd's made a succession of such offers to the Names, each in turn on slightly better terms but none offering a real end to potential liability.

settlement itself.¹⁹ By the end of 1996, about 85 percent of Names worldwide had accepted this offer, and eventually over 90 percent did so. Several thousand American Names accepted the offer, but about 600 did not.

Second, as to the Names who rejected the offer (hereafter called the non-accepting Names), Lloyd's Council exercised the by-law or self-regulatory power granted to it by the Lloyd's Act of 1982 in a most extraordinary way. It simply ordained that the agency relationships between non-accepting Names and their member's agents were terminated. It then appointed a new Substitute Agent, called Additional Underwriting Agency N. 9 (AUA9), to act on their behalf. Lloyd's then ordered AUA9 to sign the Equitas reinsurance contract on behalf of the non-accepting Names, which it did, and thus all Names were put into Equitas.²⁰ Lloyd's then paid into Equitas the premiums which, according to Lloyd's calculations, were owed by each of the non-accepting Names (without the credits given to accepting Names), and took assignments from Equitas of its claim for these premiums under the contract. This thus set the stage for Lloyd's to set about suing the non-accepting Names on these assigned claims.

In the litigation which has followed, two provisions of the Equitas contract have proved to be critical. The first of these, Paragraph 5.5, came to be called the "pay now, sue later" clause, and provided in essence that the Name in question was required to pay the amount claimed by Lloyd's up front, without any setoff or counterclaim of any kind, without seeking any stay of execution or injunction against enforcement, and *consented to the immediate enforcement of any judgment obtained by Lloyds*. Under this clause, no cause of action for any claim in connection with the obligation to make such payment would accrue to the Name until the premium in question had been fully paid. The second clause, Paragraph 5.10, came to be called the "conclusive evidence" clause. Under it, the amount of the payment to be made was that calculated by the Members' Services Unit (MSU) of Lloyd's, and these calculations were to be "conclusive evidence as between the Name and Equitas, in the absence of manifest error."²¹

In an extraordinary series of cases decided by the English courts in 1997 and 1998,²² these two clauses were given precisely the effects intended by Lloyd's. Judgments were, in effect, "confessed" against the non-accepting Names, for the full

19. For example, Mr. and Mrs. Ashenden of Illinois, who were both Names, had already met calls of Lloyd's for \$304,000 between 1992 and 1995. In 1996 they were informed they were required to pay an additional \$643,000, but were offered "credits" which would reduce this amount to about \$320,000 if they accepted the offer of settlement. See Defendants' Memorandum, *supra* note 17, at 24.

20. The Ashendens instructed their members agent not to sign the contract, and there appears to have been an argument that the agent was legally bound to follow this instruction, but in Lloyd's view AUA9 was not so restricted. *Id.* at 25.

21. The text of these provisions is set out in full in the Ashenden Memo, *supra* note 17, at 25-27.

22. See, e.g., *Society of Lloyd's v. Leighs*, 1997 WL 1104500, 1997 C.L.C. 1398 (CA July 31, 1997); *Society of Lloyd's v. Fraser*, 1997 WL 1103612, 1998 C.L.C. 127 (Q.B.D. Comm. Ct. Dec. 3, 1997), 1998 WL 1043675, 1998 C.L.C. 1630 (CA July 31, 1998). But cf. *Garrow v. Society of Lloyd's*, 1999 WL 819070, 2000 C.L.C. 241 (CA Oct. 13, 1999), where the Court of Appeal in a bankruptcy case permitted the Name in question to file a counterclaim in a pending case against Lloyd's based on fraud, as an exercise of the discretionary power of the bankruptcy court.

amount of premiums as calculated by Lloyd's. The Names who were defendants in these cases were not permitted to challenge them in any way, until after the judgments were paid in full. They were not permitted to raise any defenses to the claims, including claims of fraud against Lloyd's itself. The Names in theory could challenge the amounts claimed by Lloyd's on the ground of "manifest error." Yet, they were not permitted any discovery as to the calculation process used by Lloyd's or into the source material used in the calculation. Although numerous discrepancies of substantial proportions were shown, even in the documents produced by the MSU itself, these were not treated as manifest error. The resulting judgments against American non-accepting names are now being presented for recognition and enforcement in American courts, and it is that process of recognition and enforcement with which the final part of this essay is concerned.

Before turning to a consideration of this process, however, we should consider the attempts made to reach the merits of the claims raised by this factual background, even before Equitas came into the picture. In England, these pre-emptive efforts primarily took the form of actions by the Names against active underwriters, member's agents and managers. These claims alleged negligence or fraud, based on the agents' breach of fiduciary duty to their principals through failure to disclose the impending deluge of liability known by insiders to exist, but concealed from external Names. Many, if not all, of these suits were successful, resulting in the award of damages totaling about 1.5 billion English pounds,²³ but most of these damages awards were never paid. According to the ANA, successful litigants were never given the option of receiving such damage awards. Instead, in 1994, the Lloyd's Council unilaterally amended the by-laws relating to Premium Trust Deeds, which govern a Name's obligation to pay Lloyd's for losses allegedly owed by Lloyd's syndicates, so that, with one exception, the 1.5 billion pounds in awards and settlements went directly to Lloyd's. I have spoken with one American Name who lost \$45,000 and another who lost over \$300,000 in this fashion. These funds were presumably used as part of the reserves for Equitas.

II. PRE-EMPTIVE EFFORTS IN THE UNITED STATES

Attempts by American Names to get to the merits of the Lloyd's fiasco have taken several different forms. The primary effort took the form of actions brought in American courts against Lloyd's and/or Member's Agents for violations of American statutes regulating the sale of securities in this country. Such laws are to be found not only at the federal level but also under state law.²⁴

23. To the extent that damages were awarded in arbitration the awards are normally not only unpublished but are also confidential. Apparently many of the court cases in question were also not published.

24. Another pre-emptive effort made by the American Names was the effort to alert the state insurance commissioners and attorneys general in all American states to the questionable financial viability of Lloyd's. In 1996, Securities Regulators in 13 states issued Cease and Desist Orders against Lloyd's based on claims of violations of state laws regulating the sale of securities.

The catastrophic nature of the "long-tail" health hazard policies issued by Lloyd's syndicates over the years came to light in the early 1990s. American Names then filed actions in federal district courts in at least six different circuits, claiming they had been defrauded by Lloyd's and various Lloyd's insiders and promoters. These claims were based primarily on the Securities Act of 1933²⁵ and the Securities Exchange Act of 1934,²⁶ the purpose of which was to protect investors from unscrupulous securities dealers and to facilitate informed decision-making by investors. Enacted by Congress in response to widespread fraud in securities markets, the principal device established by the Acts is the requirement that persons selling or offering to sell securities disclose to potential investors the risks associated with the securities in question. This is implemented by imposing liability on anyone who, in offering or selling a security, "makes an untrue statement of a material fact or omits to state a material fact."²⁷ These provisions are coupled with anti-waiver provisions designed to assure that the parties cannot contract out of these statutory protections.²⁸ The actions brought in these cases alleged violations of these Acts consisting of nondisclosure in connection with the plaintiffs' initial recruitment as Names, their placement in high-risk syndicates, and pressure placed upon them to increase their underwriting limits. The relief sought typically included declaratory judgment and rescission as well as damages.²⁹ Some of the actions also alleged violations of state laws regulating the sale of securities, as well as common law fraud.³⁰

In all of these cases, Lloyd's filed motions to dismiss claiming that the forum-selection and choice-of-law clauses in the General Undertaking signed by the

25. 15 U.S.C. § 77 a-77a.

26. 15 U.S.C. §§ 78a-77mm.

27. 15 U.S.C. § 77 l(2).

28. See Securities Act of 1933 §14, 15 U.S.C. 77n. "Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules and regulations of the [Securities Exchange] Commission shall be void." The Securities Exchange Act of 1934 §29(a), 15 U.S.C. 78cc(a), also provides: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

29. *Riley v. Kingsley Underwriting Agencies Ltd.*, 969 F.2d 953 (10th Cir. 1992), *aff'g* No. 91-C-1411, 1991 WL 330770 (D. Col. Aug. 30, 1991) *cert. denied*, 506 U.S. 1021, 113 S. Ct. 658 (1992); *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *aff'g* 784 F. Supp. 1350 (N.D. Ill. 1992), *cert. denied*, 510 U.S. 1113, 114 S. Ct. 1057 (1994); *Roby v. Corporation of Lloyd's*, 996 F.2d 1353 (7th Cir. 1993), *cert. denied*, 510 U.S. 945, 114 S. Ct. 385 (1993); *Haynsworth v. The Corporation also known as Lloyd's of London*, 121 F.3d 956 (5th Cir. 1997); *Richards v. Lloyd's of London*, 135 F.3d 1289 (9th Cir. 1997) (en banc) (withdrawing panel opinion at 107 F.3d 1422 and *aff'g trial court*); No. 94-1211-IEQ(POR), 1995 WL 465687 (S.D. Cal. May 1, 1995), *cert. denied*, 525 U.S. 943, 119 S. Ct. 365 (1998); *Lipcon v. Underwriters at Lloyd's*, 148 F.3d 1285 (11th Cir. 1998). See also *Allen v. Lloyd's of London*, 94 F.3d 923 (4th Cir. 1996), in which 93 Names sued in federal district court in Virginia, after the R&R offer, to force Lloyd's to disclose more financial information. A trial court order of disclosure was reversed on appeal, on the basis of the forum selection clause.

30. *E.g., Riley*, 969 F.2d at 956. In several of these cases the primary basis of asserted liability was state law: *Shell v. R.W. Sturge, Ltd.*, 55 F.3d 1227 (6th Cir. 1995) (Ohio Blue Sky Law); *West v. Lloyd's*, No. B095440, 1997 WL 1114662 (Cal. App. 2d Dist. Oct. 23, 1997) (California Securities Law) (Not selected for official publication but available on Westlaw and through the ANA).

Names required that any such actions be brought only in English courts and under English law. In cases joining Member's Agents or underwriters as defendants, the argument was also made that arbitration in England was mandatory. In all of these cases save one, Lloyds has been ultimately successful in obtaining dismissal in the American federal courts, on the ground that these clauses should be enforced.³¹ That result has been ably and persuasively criticized in a scholarly work, analyzing the cases decided before its publication. It argues that such enforcement is directly contrary to the anti-waiver provisions of the American Securities Acts, and ignores the strong policies favoring protection of American investors.³²

For purposes of this discussion, I will focus on *Lipcon v. Underwriters at Lloyd's*,³³ the most recent of these cases. In *Lipcon*, the court conceded that the anti-waiver provisions "facially admit of no exceptions," but concluded that the "framework for evaluating choice clauses in international agreements" established by *M/S Bremen v. Zapata Off-Shore Co.*³⁴ "governs this case."³⁵ In applying the *Bremen* evaluation the court concluded that the clauses in question were enforceable under applicable public-policy tests because the court was "confident" that the policies underlying American securities laws could be vindicated in litigation in the English courts.³⁶ In doing so, it ignored the plain language of the statutes, an *amicus* brief filed by the U.S. Securities Exchange Commission in support of the Names, and the scholarly criticism of the other Circuits' cases. Its confidence in the English courts and English law was not even shaken by the fact that Lloyd's was exempted from the English Misrepresentations Act by Section 14 of the Lloyd's Act of 1982, which the court conceded. It found solace in the fact that member's agents and managers of the syndicates were not so exempted.³⁷

In my opinion, the court in *Lipcon* was mistaken in its basic premise, namely, that *Bremen* provides the "governing" law for evaluating the validity of choice of forum and choice-of-law clauses in these cases. *Bremen* was (and is) the leading American case enforcing a choice-of-forum clause in an international contract. It involved a contract between an American owner of an off-shore drilling rig and a German shipping corporation under which the latter was to tow the rig with its ship (the *Bremen*) from the Gulf of Mexico to the Adriatic Sea off Italy. In addition to a forum selection clause under which any disputes were to be resolved in the English courts, the contract provisions included certain exculpatory clauses which would not have been enforceable in a domestic admiralty case in the United States on

31. The one exception, *West v. Lloyd's*, is discussed *infra*, text at notes 68-71.

32. Darrell Hall, *No Way Out: An Argument Against Permitting Parties to Opt Out of U.S. Securities Laws in International Transactions*, 97 Colum. L. Rev. 57 (1997).

33. 148 F.3d 1285 (11th Cir. 1998).

34. 407 U.S. 1, 92 S. Ct. 1907 (1972).

35. 148 F.3d at 1292.

36. *Id.* at 1299 (citing *Bonny v. Society of Lloyd's*, 3 F.3d 156, 162 (7th Cir. 1993)).

37. *Id.* at 1297.

grounds that they were contrary to public policy (as established in prior admiralty law).

In enforcing the forum selection clause, the United States Supreme Court emphasized two important aspects of the case presented. First, the case involved a truly international contract, in which the American party was seeking to rely on a rule of domestic policy, and the Court concluded that insistence on imposition of that policy would be a parochial view of the international business community and an impediment to international trade.³⁸ Second, the forum clause in question was not imposed by one dominant party upon the other, as in adhesion contracts, but rather was fully negotiated between two large, sophisticated corporations dealing at arms length.³⁹ In this setting, the Court concluded that such clauses should be enforced.

Two features of *Bremen* make it clearly distinguishable from the Lloyd's cases. First, the Court itself clearly recognized that it was deciding the issue for "federal district courts sitting in admiralty,"⁴⁰ and thus set a binding precedent *only* for admiralty cases. Second, the policy against enforcement of exculpatory clauses in towage contracts was a matter of common law admiralty law established in an earlier Supreme Court case.⁴¹ As the ultimate appellate court sitting in admiralty, the Court was obviously at liberty to change that rule or, as it in fact did in *Bremen*, to reinterpret it to restrict its scope to domestic towage contracts.⁴² Without question, the Court would have been confronted with a completely different issue if the policy against exculpatory clauses had been embodied in a federal statute specifically prohibiting the enforcement of such clauses.

To be sure, this analysis of the actual holding in *Bremen* does not prevent it from becoming persuasive authority in other courts and other types of cases, and indeed that is precisely what has occurred. *Bremen* has been widely cited and its reasoning adopted, for example, by many state courts in cases not involving either admiralty or international contracts, and the 1986 revision of § 80 of the Restatement (Second) of Conflict of Laws takes the position that choice-of-forum clauses should be enforced unless unreasonable or unfair.⁴³ Some lower courts have even taken the view that *Bremen* establishes a federal common law rule applicable in diversity cases as well as those based on federal law.⁴⁴ The Supreme Court, however, has not adopted that view, even when the opportunity to do so presented itself, and has left that question open.⁴⁵

38. 407 U.S. at 9-11, 15, 92 S. Ct. at 1912-13, 1916.

39. *Id.* at 12-14, 92 S. Ct. at 1914-15.

40. *Id.* at 10, 92 S. Ct. at 1913.

41. *Bisso v. Inland Waterways Corp.*, 349 U.S. 85, 75 S. Ct. 629 (1955).

42. 407 U.S. at 15-16, 92 S. Ct. at 1916.

43. *See* Scoles & Hay, *supra* note 2, at 366-67.

44. *Id.* at 365. *See, e.g., Ronar, Inc. v. Wallace*, 649 F. Supp. 310 (S.D.N.Y. 1986), *Int'l Software Sys. Inc. v. Amplicon Inc.*, 77 F.3d 112, 114 (5th Cir. 1996).

45. *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 108 S. Ct. 2239 (1988), presents the question whether federal law governed the transfer of a case from federal court in Alabama to federal court in New York, under the federal transfer statute, 28 U.S.C. § 1404(a), where the contract in dispute contained a clause selecting the New York forum, but Alabama law was hostile to such clauses. The

Three other Supreme Court cases have formed the basis of the opinions of the courts which have enforced the forum-selection and choice-of-law clauses in the Lloyd's cases. None of these, I submit, has provided any firm basis for the Lipcon court's conclusion that *Bremen* is "governing law" in the Lloyd's cases. One of these cases, *Carnival Cruise Lines, Inc. v. Shute*,⁴⁶ enforced an interstate forum-selection clause in a ship's-passage ticket, notwithstanding the adhesiary nature of that contract. This was, of course, also an admiralty case, and therefore binding federal law on that basis.⁴⁷ Although its holding unfortunately weakened the "freely negotiated" requirement of *Bremen*, it did so in the context of a case where only inconvenience and no strong public policy opposed the transfer.⁴⁸

The other two cases on which reliance is placed in the Lloyd's cases both involved arbitration clauses, and were decided under the Federal Arbitration Act.⁴⁹ On that basis alone, therefore, neither case supports the existence of a common law rule favoring forum-selection clauses and, when closely examined, neither case fully supports the position of the Lloyd's underwriters, even in those cases involving arbitration clauses.⁵⁰ The first of these, *Scherk v. Alberto-Culver Co.*,⁵¹ involved a contract for purchase of several business enterprises in Europe by an American corporation, and included a clause providing for arbitration in Paris. Later claiming that the seller had been guilty of fraudulent misrepresentations as to the status of trademarks involved in the sale, the buyer brought an action for damages in Illinois, alleging that the seller's conduct constituted violations of the U.S. Securities Acts. The seller sought a stay pending arbitration, but lost in the courts below because prior authority had held that an arbitration clause could not preclude a buyer of a security from seeking a judicial remedy under the Securities Acts.⁵² The Supreme Court reversed, holding that the parties' agreement to arbitrate should be respected and enforced because such a clause is, in effect, a specialized kind of forum-selection clause.⁵³ This device removes one of the uncertainties in international

Court held it was a matter of federal law involving the interpretation of the scope of the federal statute. Two justices (Kennedy and O'Connor) concurred in *Ricoh* on the theory that the question was one of federal common law, while one (Scalia) dissented on the ground that the validity of forum-selection clauses should be left to state law. See also Scoles & Hay, *supra* note 2, at 365-66.

46. 499 U.S. 585, 111 S. Ct. 1522 (1991).

47. See *Carnival Cruise Lines, Inc. v. Superior Court*, 222 Cal. App. 3d 1548, 272 Cal. Rptr. 515 (1990), vacated for reconsideration in light of *Shute* in 499 U.S. 972, 111 S. Ct. 1614 (1991), narrowly construed on remand in 234 Cal. App. 3d 1019, 286 Cal. Rptr. 323 (2d Dist. 1991).

48. The *Shute* case did involve interpretation of a federal statute declaring some kinds of contract clauses void. See 46 U.S.C. App. § 183 c(d). The Court interpreted this provision as forbidding only clauses which waived the right to a judicial hearing. *Schute*, 499 U.S. at 595-97, 111 S. Ct. at 1528-29. There was never any question about the availability or adequacy of the remedies available in the Florida courts, to which the forum-selection clause referred disputes.

49. 15 U.S.C. § 1.

50. See *supra* note 14.

51. 417 U.S. 506, 94 S. Ct. 2449 (1974).

52. *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182 (1953), overruled by *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 485, 109 S. Ct. 1917, 1921, 1922 (1989) (over four dissents).

53. 417 U.S. at 519, 94 S. Ct. at 2457.

dispute-resolution (citing *Bremen*), and this result is buttressed by the strong policies favoring arbitration. As for the protective policies of the Securities Acts, the Court found it unnecessary to decide whether the contracts in this case involved the sale of securities. What it did say, however, was that fraud of the kind which Alberto-Culver alleged could presumably be raised in challenging the enforcement of any arbitral award which might be obtained by Sherk, on the grounds that it was contrary to public policy, should Sherk seek to enforce such an award under the treaty.⁵⁴ Moreover, since the parties in *Sherk* had agreed (in the arbitration clause) that the "laws of the State of Illinois, U.S.A., shall apply to and govern this agreement, its interpretation and performance,"⁵⁵ it would appear that any refusal by the arbitral tribunal in France to apply the protective provisions of those laws to Alberto-Culver would provide a similar defense to enforcement.

The second case was *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,⁵⁶ which also enforced a clause in an international contract, in this instance calling for arbitration in Japan. Soler resisted its enforcement on the ground that Mitsubishi had violated American antitrust laws, and relied on prior authority that the judicial remedies for such violations cannot be displaced by agreements to arbitrate.⁵⁷ Again relying on the desirability of a non-parochial approach to international commerce, and citing *Bremen*, as well as on the strong federal policy favoring arbitration, the Court denied Soler any immediate access to the federal courts. In so doing, however, the Court was not confronted with a situation in which Soler would be denied the protection of the American laws. Counsel for Mitsubishi conceded in oral argument that American law applied to the antitrust claims, and represented that the claims had been submitted to the arbitration panel in Japan on that basis.⁵⁸ Moreover, referring to the possibility that the panel might decline to apply these laws, the Court said:

Nor need we consider now the effect of an arbitral tribunal's failure to take cognizance of the statutory cause of action on the claimant's capacity to reinitiate suit in federal court. We merely note that *in the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies for antitrust violation, we would have little hesitation in condemning the agreement as against public policy.*⁵⁹ (emphasis added)

In the face of that language, it is quite astonishing that the *Lipcon* court conceded that the Equitas contract clauses "may operate in 'tandem' as a prospective waiver of the statutory remedies for securities violations"⁶⁰ and nevertheless, proceeded to find that they were not against public policy. It did so,

54. *Id.* at 519 n.14, 94 S. Ct. at 2457 n.14.

55. *Id.* at 508-09 n.1, 94 S. Ct. at 245 n.1.

56. 473 U.S. 614, 105 S. Ct. 3346 (1985).

57. *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1967).

58. 473 U.S. at 637 n.19, 105 S. Ct. 3359 n.19.

59. *Id.*

60. *Lipton v. Underwriters at Lloyd's London*, 148 F.3d 1285-98 (11th Cir. 1998).

it explained, not only for the reasons cited by the other circuit courts, but also because it concluded that the "English remedies are adequate to provide redress. . . to appellant's United States securities claims."⁶¹

I have no problem with the policies developed in the case law of the Supreme Court in *Bremen*, *Scherk*, *Mitsubishi*, and *Shute*, so far as these are used to create a favorable climate for the enforcement of choice-of-law and forum-selection clauses, namely, an internationalist view which promotes certainty and trust in international commerce, and promotes speedy and efficient resolution of disputes. Within that climate the enforceability of such clauses should, all other things being equal, enjoy a presumption of enforceability.

All other things are not equal, however, when these judicially formulated policies find themselves in direct conflict with specific statutory provisions, such as the anti-waiver provisions of the Securities Acts, which by any fair interpretation must be read as prohibiting the enforcement of such clauses. They are also not equal when they conflict with state statutes or policies arising in conflict-of-law cases based on diversity of citizenship, where state law still governs, whether the forum in question is federal or state.

Such a direct conflict occurs in the Lloyd's cases. It did not occur in *Bremen* or *Shute*, so those cases are not relevant to this problem. Such direct conflicts did occur in *Scherk* and *Mitsubishi*, and the Supreme Court resolved the conflict in both cases by enforcing the forum-selection clause while assuring itself that the foreign tribunal in each of those cases would apply the specific laws which the opposing policy was intended to protect. As we have seen, the Court assured itself in *Scherk* that the Paris tribunal in question would apply the laws of Illinois, surely including its Blue Sky Laws⁶² designed to serve the same protective function as the Securities Acts. In *Mitsubishi*, the Court assured itself that the Japanese tribunal would apply the American antitrust laws to the case referred under the forum-selection clause. In both of these cases, the Court strongly intimated that awards emanating from these foreign tribunals would be subject to a public policy defense if these tribunals failed to apply those laws, and if the awards were later presented for enforcement in the United States.

The only way the lower federal courts could resolve this conflict in the Lloyd's cases, and be consistent with the Supreme Court cases, was to determine that the English courts would either apply the American laws as such or, *at the very least, to provide remedies that are the substantial equivalent to the protections available in the Securities Acts*. To demonstrate how feeble and unpersuasive their attempts to make this showing have been, I return to the focus on *Lipcon*, because it is fairly representative of the reasoning in the Lloyd's cases in the other Courts of Appeal. In addition, as the most recent of these cases,⁶³ the *Lipcon* court had the fullest

61. *Id.* (citing *Roby v. Corp. of Lloyd's*, 996 F.2d 1353 (7th Cir. 1993), *cert. denied*, 510 U.S. 945, 114 S. Ct. 385 (1993) and *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993), *aff'g*, 784 F. Supp. 1350 (N.D. Ill. 1992), *cert. denied*, 510 U.S. 113, 114 S. Ct. 1057 (1994)).

62. See 815 Ill. Comp. Stat. 5/13 (West 1992).

63. Decided Aug. 5, 1998.

opportunity for an objective assessment of the lack of fairness in the English treatment of the American Names.⁶⁴

The *Lipcon* opinion relies on the English courts and English law to provide "adequate remedies," and it is true there are some English statutes which provide protection to purchasers of securities—not as stringent as, but at least comparable to, protections under the Securities Acts.⁶⁵ The problem was that Lloyd's was exempted from liability under precisely those statutes by Section 14 of the 1982 Lloyd's Act. At the time of *Lipcon*, evidence was also available that "no Name has ever successfully sued Lloyd's for damages or rescission in England," that the narrow exception of "bad faith" in the English statute giving Lloyd's immunity from tort liability is a "very difficult burden," and, most damningly in comparison with the Securities Acts, that "fraudulent nondisclosure by Lloyd's is not an actionable wrong under English law because Lloyd's has been held to have no duty of disclosure to Names."⁶⁶

The *Lipcon* court attempted to bolster its reliance on the adequacy of English remedies by pointing out that the 1982 Lloyd's Act did not provide immunity to member's agents, and that recent cases had in fact upheld the liability of such agents for negligent underwriting.⁶⁷ True enough. But, putting to one side the probability that the massive claims here involved may well have bankrupted the agents in question, and left the Names with meaningless claims, the *Lipcon* court chose to ignore the fact that most of the damages or settlements recovered by Names against member's and managing agents—to the tune of 1.5 billion pounds—were never paid to the successful litigants. These recoveries were appropriated by Lloyd's, to help fund the reserves in Equitas, under Lloyd's amendment of the by-laws concerning the Premiums Trust Deed. The *Lipcon* court does not discuss this problem in connection with the adequacy of the English remedies, but mentions it only in connection with the contention—rejected by the court—that the Names were fraudulently induced to agree to be bound by changes in the by-laws authorized by the Lloyd's Act of 1982.⁶⁸

In this desert of "me-too-ism" demonstrated by the federal courts' unanimous enforcement of the forum clauses there is one inviting oasis: the *West* case in California state court. West, a non-accepting Name, sued Lloyd's for violations of

64. Its investigation seems mostly confined to opinions expressed in the other circuit court opinions, and that was also true of earlier cases, each relying on the others and ultimately back to a fundamental assumption about the fairness of English courts. For example, in *Roby*, on which both *Hanysworth* and *Lipcon* rely, the court said that English remedies were adequate because of "low scienter requirements," suggesting that even a showing of negligence would suffice for recovery. 996 F.2d at 1365. In the very next paragraph the *Roby* court notes that the 1982 Act immunized Lloyd's for torts except for acts in bad faith, and then concludes with this astounding statement: "Furthermore, as a self-regulating organization, we cannot say that Lloyd's own bylaws will not insure the honesty and forthrightness that American investors deserve and expect." (!) *Id.*

65. 148 F.3d at 1298-99.

66. See Affidavit of Charles Hicks, in *West v. Lloyd's*, No. B095440, 1997 WL 1114662 (Cal. App. 2d Dist. Oct. 23, 1997).

67. 148 F.3d at 1297-98.

68. *Id.* at 1296-97.

the California securities laws in 1994.⁶⁹ That case is now reportedly set for trial in the state court during the spring of 2000, and apparently represents the last hope of the American Names to get a straightforward litigation of the fraud and nondisclosure issues involved in the Lloyd's cases in an American forum.⁷⁰ The six-year delay in getting this case to trial is a further demonstration of the tenacity Lloyd's has shown in frustrating every attempt to resolve these alleged frauds in a fair trial. Ironically, it now appears that this trial will occur because of a tactical error on the part of Lloyd's. Its second attempt to remove the case to federal court, where it presumably would have enjoyed the "me-too-ism" displayed by the other federal courts, was held to be time-barred and the case was remanded for trial in the Los Angeles Superior Court.⁷¹

The California Court of Appeal in *West* reviewed the federal cases and disagreed with their result,⁷² concluding that, whatever the federal rule might be as to subordination of the anti-waiver provisions of the Securities Acts to policies favoring the promotion of international commerce, the choice-of-forum and choice-of-law clauses in the Lloyd's agreements were void and unenforceable under California law. The upcoming trial will be of interest to many observers.

III. THE ENGLISH JUDGMENTS STAGE OF THE CONTROVERSY

As noted earlier, the large majority of Names, including a substantial majority of American Names, entered into Lloyd's R&R plan in 1996. Induced by "credits" against the amount of premiums they were required to pay into Equitas, they executed full and explicit releases to Lloyd's and all its agents. In doing so, and paying the reduced premiums assessed against them, they bought an immediate respite from enforcement of future claims but no protection from liability for those claims if Equitas' reserves prove to be inadequate to pay them. Since by Lloyd's own calculations these claims are likely to run to the year 2030, and to aggregate more than 20 billion pounds, and since comparatively little "new money" was

69. *West v. Lloyd's*, No. B095440, 1997 WL 1114662 (Cal. App. 2d Dist. Oct. 23, 1997).

70. A similar case in England, involving multiple British Names as plaintiffs but under the heading of *Jaffray v. Society of Lloyd's*, was also scheduled to go to trial in January 2000, also after long delays, but I am reliably informed by an American Name that this date has again been postponed. The *Jaffray* case is described in *Garrow v. Society of Lloyd's*, 99-0597.3, 1999 WL 819070 (Oct. 13, 1999), in an appellate opinion of the Supreme Court of Judicature allowing Garrow, a non-accepting British Name, to become a plaintiff in *Jaffray* as a matter of discretion, on a finding that Garrow had a "genuine and serious claim" against Lloyd's and had been forced into bankruptcy by the claims made by Lloyd's. Lloyd's resisted his inclusion on the ground that he had not yet paid his full premium into Equitas (as determined by Lloyd's). A reading of the *Garrow* opinion will lay to rest any illusions that the Names recruited to bear the asbestosis disaster were all wealthy and sophisticated investors, as well as any illusions about Lloyd's compassion in its pursuit of the Names down to their last farthing. Garrow was an artist and a teacher, who lost his job, his home, his life savings, and probably also his wife, as a result of the Lloyd's debacle.

71. See Order Remanding Case, *West v. Lloyd's*, U.S. District Court for the Central District of California, No. CV 98-116 SVW (Apr. 4, 1998).

72. Cases cited in note 29, except that at the time of the California opinion only the first Ninth Circuit opinion had been issued in *Richards*, and it had rejected enforcement of the choice clauses.

brought into the Equitas reserves, that day of reckoning may not be long deferred. When the Equitas resources are exhausted it appears that the Names who accepted R&R will be the target for enforcement of claims by Lloyd's. In view of the releases they executed, for a substantial *quid pro quo*, their chances of avoiding enforcement seem slim indeed.

As for the non-accepting Names, prospects are somewhat brighter. As also noted earlier, Lloyd's appointed a Substitute Agent (AUA9) to act for these Names, although AUA9 has clearly acted as the agent of Lloyd's in signing the Names in question into R&R over their specific instructions not to do so. Lloyd's then paid the premiums allegedly owed by these Names to Equitas, as conclusively calculated by another agency of Lloyd's, and took assignments of the Equitas' claims. These are now being reduced to judgment in the English courts against several hundred non-accepting Names.

Enforcement against American Names will be sought as foreign money judgments in the United States. If they are treated as conclusive in our courts, under theories of *res judicata*, they may be enforced by execution against the property of the American Names without any opportunity for a trial on the merits of these claims, either as to their validity or their amount. Two such judgments have thus far been presented for recognition and enforcement, both in federal courts, one in New York⁷³ and one in Illinois.⁷⁴ Both trial courts have ruled in favor of Lloyd's, and both cases are on appeal. Discussion here will be limited to the *Ashenden* case in Illinois, since that is the only opinion available to me. At least in *Ashenden* the defendants did appear and were represented by counsel in the English court. It is conceded in the federal court in Illinois, however, that the defendants were not permitted to file any counterclaim against Lloyd's nor to question the amount of the claim in the English court, because of the clauses in the Equitas contract.

There is no doubt that this case is governed by state law, although filed in the federal court.⁷⁵ Illinois has adopted the Uniform Foreign Money Judgments Recognition Act,⁷⁶ and Lloyd's was granted summary judgment against the Ashendens under that statute, upon the court's determination that the facts are not in dispute. The lengthy recital of these facts by the court in almost all respects confirms the description of events in the earlier part of this essay, including the history and structure of Lloyd's, the operation of the syndicates, the process of becoming a Name, the disclosure in the early 1990s of the "long tail" contingent liabilities involving asbestos and pollution claims, the construction of the R&R, and the forced inclusion of non-accepting Names into the Equitas reinsurance program

73. The New York defendant is W.R. Grace, but I have not been able to obtain any of the documents involved.

74. *Society of Lloyd's v. Ashenden*, No. 98-C-5335, 1999 WL 284775 (N.D. Ill. Apr. 23, 1999), now on appeal to the 7th Circuit Court of Appeal as No. 99-3195. In this case, I have also examined the Memorandum of Law cited in *supra* notes 17, 19, 20, and Defendant's Brief on Appeal, cited hereafter as Defendant's Brief. Lloyd's Brief on appeal is not yet due at the time of this writing, and is therefore not available.

75. See text accompanying cases in *supra* note 6.

76. 735 Ill. Comp. Stat. 5/12-618-626. This Uniform Act has been adopted in 30 states.

(without the benefit of credits offered the accepting Names), through the use of the "Substitute Agent." The "pay now, sue later" and "conclusive evidence" clauses are described as "Further features of the plan, designed to prevent it from being tied up in litigation ... [by] barring a Name from claiming a set-off against Lloyd's and from disputing the amount of his reinsurance premium except in a very cursory manner."⁷⁷

The Ashendens' defense was based on two parts of the Act, in the section "Grounds for Nonrecognition." The pertinent language is:

(a) A foreign judgment is not conclusive if (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law . . .

[and]

(b) A foreign judgment need not be recognized if . . . (3) the cause of action on which the judgment is based is repugnant to the public policy of this state . . .

The trial court summarily rejected defendants' argument under (b)(3) that the English cause of action was repugnant to Illinois public policy because it amounted to a *cognovit*, pointing out that only consumer *cognovits* are impermissible in Illinois. The court concludes, correctly in my opinion, that "What they are really complaining about is the perceived lack of due process after they received notice under which the judgments were entered . . ." This defense thus folds back into the due process defense under Par. (a)(1).

The Illinois federal court begins its discussion of the due process issue by reciting the three "test cases" in England which confirmed (1) the authority of Lloyd's to create *Equitas*, and to bind the non-accepting Names to the reinsurance contract by the use substitute agents, (2) the validity of the "pay now, sue later clause," and (3) the validity of the "conclusive evidence" clause. Recognizing that all three of these propositions were used in obtaining the judgment against the Ashendens, the court concludes:

It is clear that the Ashendens have been denied a meaningful pre-deprivation hearing in the English court that entered summary judgments against them, due to the pay now, sue later, and the conclusive evidence clauses. They were not allowed seriously to challenge the claims brought against them by Lloyd's. *However, neither English law nor the Plan prevents the Ashendens from bringing separate suits in England to contest the amount claimed and to present other claims they felt they have against Lloyd's, such as their claim for fraud.* (Emphasis added).

77. The additional fact recited by the court, which I had not seen before, was Lloyd's explanation of the reasons for creating *Equitas*, to "ensure Lloyd's survival." It now includes the cost of litigation brought by Names against Lloyd's and its agents, for negligent underwriting and fraud, a most curious example of blaming the victim.

At several other points in the opinion the court also refers to the availability to the Ashendens of separate actions in England for the alleged fraud of Lloyd's, including joinder with pending actions.⁷⁸ It also relies on the earlier federal cases discussed at length above, enforcing the forum-selection and choice-of-law clauses of the General Undertaking, for their conclusion that the English courts offer "adequate remedies."⁷⁹ In doing so, it republishes for the judgment-recognition cases precisely that same error committed in the earlier cases. These are not simply forum selection cases at large, in which general policies favoring an internationalist view are dominant. These are rather cases in which Congress has by specific statutes declared the clauses in question to be void. As we have seen, a careful reading of the Supreme Court cases in this area makes it clear that enforcement of such a clause in the face of the anti-waiver statutes is permissible *only* if the protections given in the foreign courts to American investors are substantially equivalent to the protections given by the Securities Acts. Those protections go well beyond claims of fraud, and encompass claims for nondisclosure of material facts or risks by Lloyd's. Moreover, the Ashenden court does not address the question whether a remedy would be "adequate" even if damages awarded cannot be collected, because the defendant can simply have them impounded for use as reserves in a reinsurance company which it controls. In my view, it cannot now be seriously suggested that the protections available to the Ashendens or other American Names in the English courts are even remotely equivalent to those to which they are entitled under American law.

One recurrent theme in the Lloyd's cases is the constant reminder that the American Names subjected themselves to English law and courts, and that enforcement of these clauses does no more than force them to live up to their agreements. But this is a two-sided coin, and rarely do we see any reference to the reverse side. In its recruitment of American Names in the United States, Lloyd's and its agents were clearly subjecting themselves to the American laws regulating the sales of securities. These actors had access to very good legal advice, and knew or should have known about two clear aspects of those laws: First, that nondisclosure of material facts and risks subjected them to full legal liability; and second, that the purchasers are not permitted to waive those protections in advance, by any contractual agreement. If American courts do not recognize that this balances the equation, then who will do so?

Having conceded that the Ashendens did not receive a fair hearing in the English court, the federal district court in Illinois recognized that this constituted a clear deprivation of due process under the holding of *Fuentes v. Shevin*⁸⁰ and its numerous progeny: that in the absence of exigent circumstances, due process requires a meaningful opportunity to be heard before property is seized. The court

78. See *supra* note 70, presumably referring to *Jaffray*.

79. Especially *Bonny v. Society of Lloyd's*, 3 F.3d 156 (7th Cir. 1993). The Ashendens were themselves also parties to one of the suits in which the forum-selection clause was enforced. *Ashenden v. Lloyd's of London*, No. 96-852, 1996 WL 717464 (N.D. Ill. Dec. 9, 1996).

80. 407 U.S. 67, 92 S. Ct. 1983 (1972).

attempted to squeeze the case under the exception for exigent circumstances, arguing that the formation of Equitas was required to save Lloyd's from financial ruin, and to honor the interests of policyholders of Lloyd's insurance. The exigency exception to *Fuentes* has two legs, however, neither of which will support it in this case. The first is that a true exigency must exist. There may have been such an emergency at the time Lloyd's created Equitas, although that is at least open to question. It is clear, however, that the emergency was past by the time Lloyd's took this judgment against the Ashendens. Equitas was in full operation, and the only exigency lay in Lloyd's haste to recover the money it had paid to Equitas to acquire the assignment of this claim. But in any event the exception also requires "an effective post-deprivation remedy." This leg of the exception puts the matter squarely back into the issue of the adequacy of English remedies under the forum selection clause, and the prognosis of adequacy fares no better here than it did there, for the same reasons.

IV. WHAT CAN BE DONE?

An important first step in setting the record straight would be an outright reversal of *Ashenden* by the Seventh Circuit, ordering summary judgment for the defendants. At the least the Court of Appeal should remand to the district court for a *de novo* factual determination of the adequacy of the available English remedies, as those have been demonstrated to exist (or not exist) since this court decided *Bonny* in 1993. Such a remand should include instructions about a standard of adequacy to be applied, and that standard should explicitly require a waiver by Lloyd's of its immunity from liability for tort under the 1982 Lloyd's Act, as well as a showing that Lloyd's has legal liability for nondisclosure to Names. In the alternative the remand could permit the Ashendens to file its counterclaims directly in this case, for trial in the federal court in Illinois, under the very Securities Acts and Illinois statutes designed to protect them. Anything less than one of these three approaches will deny the Ashendens the protection to which they are entitled under American law.

Beyond this immediate method of redress I hope that scholars who will be studying judgment-recognition practice in the new project of the American Law Institute, or in the development for future proposals of recognition treaties, will consider the inclusion of devices which will assist the courts in balancing the policies protecting American litigants with the policies promoting international commerce. In dealing with forum-selection clauses one device which seems promising is reflected in the suggestions just made with respect to *Ashenden*. An attempt to enforce a forum-selection clause is in essence a motion for change of venue. We already have a mechanism for dealing with problems of unfairness in such cases, namely, a conditional dismissal dependent on the waiver of defenses, such as a statute of limitations, which might otherwise be raised in the new forum. We should tackle the formulation of standards governing such waivers in these new change of venue cases.

V. CONCLUSION

I have said some unkind things about Lloyd's, and they needed to be said. But I cannot finish this essay without expressing real sorrow that the historic institution of Lloyd's, as we knew it, with a rock solid reputation for solidity and integrity, has come to such an ignominious end. Insurance is still sold in the Lloyd's market, to be sure, but its reputation has been severely blackened and even its structure has changed. According to an article by Godfrey Hodgson, recently published in England,⁸¹ Lloyd's is now down to under 4000 Names, from over 32,000 in 1988. About 70 percent of Lloyd's market capacity is now furnished by corporate capital, which of course has limited liability. In Hodgson's view, this means

At best, Lloyd's will soon be utterly changed. At worst, it is quite possible that it will simply disappear, or become one of those vestigial institutions whose "greatness" we go on about for decades after they have ceased to be great by any objective standard.

Perhaps the most poignant part of Hodgson's epitaph is this:

Lloyd's is a parable of several of the things that have gone wrong in British life over the last century. The most obvious point, and it has been made over and over again, is that the Lloyd's debacle is about class privilege. No doubt public schoolboys were more trusted at Lloyd's than state schoolboys. Until recently, graduates were few and far between. Skills were learned by sitting next to old Tim, and too often among the skills old Tim imparted were cronyism, long lunches, tax avoidance and skimming off the Names' money into offshore reinsurance companies secretly owned by old Tim and his mates. No doubt, too, apart from the genuine service it provided for the international insurance market and the shipping industry, Lloyd's was also a machine for protecting the fortunes of some very rich people. It may be a lot less true than it was, but it is still too true. . . . Most fatal of all, though, was the instinct for secrecy. Again, Lloyd's did try to be more open in the 1990s, but too little, and far too late. By then, too many things that could not be admitted were going on—as past litigation has revealed. Transparency was not an option.

81. *Lloyd's on the Rocks*, The Guardian, Jan. 11, 2000.